STATE OF ALASKA

IBLA 92-254 Decided December 5, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reinstating, in part, Native allotment application AA-5896.

Appeal dismissed.

1. Administrative Authority: Generally--Alaska: Native Allotments

A decision reinstating a Native allotment application covering lands previously conveyed out of Federal ownership is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since the Department lacks jurisdiction to make such a ruling in the absence of legal title and an appeal of such a decision by an adverse party is properly dismissed as premature.

APPEARANCES: John T. Baker, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 21, 1992, reinstating, in part, Peter Ewan's Native allotment application AA-5896. The reinstated application embraces approximately 130 acres of land described as the SE¼ SW¼, SW¼ SE¼ sec. 6 and a portion of lot 6, a portion of lot 9, lots 10 and 11, and the NE¼ NW¼ sec. 7, T. 4 N., R. 1 W., Copper River Meridian, Alaska.

On February 14, 1942, lands within the SE¼ SW¼ sec. 6 were withdrawn by Air Navigation Site No. 167 from all forms of appropriation under the public land laws for the use of the Commerce Department in the maintenance of air-navigation facilities. On December 15, 1944, Public Land Order No. (PLO) 255 withdrew the SW¼ SE¼ sec. 6 and the NE¼ NW¼, NW¼ NE¼ sec. 7, T. 4 N., R. 1 W., from all forms of appropriation for use of the War Department for military purposes.

According to a July 15, 1960, handwritten note found in the records of the Bureau of Indian Affairs (BIA), Ewan visited the Anchorage Agency to apply for an allotment encompassing the SE¼ SW¼, SW¼ SE¼ sec. 6 and the NE¼ NW¼, NW¼ NE¼ sec. 7, T. 4 N., R. 1 W., Copper River Meridian. By letter dated July 26, 1960, BIA requested BLM's advice as to the availability of the requested lands before completing Ewan's application. On September 8, 1960, BLM informed BIA that the lands were not available for allotment because they had previously been withdrawn by Air Navigation Site No. 167 and PLO 255. By letter dated September 13, 1960, BIA advised Ewan that the lands he had selected had been withdrawn from all forms of public entry including Native allotments and that he would, therefore, have to select other lands.

In June 1961, PLO 2418 revoked PLO 255, in part, and Air Navigation Site No. 167 entirely and gave the State of Alaska a preferred right to select the released lands. The lands subsequently selected by the State included the SE¼ SW¼ and the SW¼ SE¼ sec. 6 and the NE¼ NW¼ sec. 7, T. 4 N., R. 1 W., Copper River Meridian. On August 20, 1964, the Department issued Patent No. 50-65-0127, conveying those lands, among others, to the State of Alaska.

On March 4, 1970, BIA filed a Native allotment application (AA-5896) on Ewan's behalf with BLM pursuant to the provisions of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971). The application identified the requested land as lots 7, 8, 12, and 13 and the NW¼ NW¼ NE¼ sec. 7, T. 4 N., R. 1 W., Copper River Meridian, containing approximately 29.02 acres, and claimed use and occupancy beginning in 1936. Under the remarks section of the application, Ewan stated: "This land is only part of my land – the rest (130 acres) has been taken by the State of Alaska." On December 13, 1983, BLM issued Certificate of Allotment No. 50-84-0035 to Ewan for the 29.02 acres. 1/

On November 22, 1983, BIA asked BLM to reinstate the additional 130 acres which Ewan had requested in 1960 and forwarded copies of the 1960 correspondence as verification of Ewan's original intent. BIA asserted that the information provided to Ewan in 1960 was erroneous because, since his use and occupancy commenced prior to both withdrawals, the withdrawals would have been subject to his valid existing rights and could not have precluded his selection. BLM gave Ewan's allotment active status on January 18, 1984, and placed it on the land records but did not

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1/ On Oct. 11, 1979, while this application was pending, the Department issued Patent No. 50-80-0002, transferring lots 6 and 11 of sec. 7, T. 4 N., R. 1 W., to Tazlina, Inc.

officially notify Ewan or interested parties of the activation of the allotment application.

In its January 21, 1992, decision, BLM notified all interested parties of the reinstatement of Ewan's Native allotment application for approximately 130 acres in the SE¼ SW¼ and the SW¼ SE¼ sec. 6, and portions of lots 6 and 9, lots 10 and 11, and the NE¼ NW¼ sec. 7, T. 4 N., R. 1 W., Copper River Meridian, Alaska. BLM advised that the lands embraced by the reinstated application had previously been either patented or withdrawn from entry under the public land laws. Specifically, BLM explained that the SE¼ SW¼ and the SW¼ SE¼ sec. 6 and the NE¼ NW¼ sec. 7 had been patented to the State of Alaska on August 20, 1964, that lots 6 and 11 had been patented to Tazlina, Inc., on October 11, 1979, and that a portion of lot 9 and all of lot 10 had been withdrawn for military purposes on June 30, 1961, by PLO 2418, which amended Air Navigation Site No. 167. The State thereupon filed the instant appeal. 2/

On appeal, the State argues that BLM erred in reinstating Ewan's application for 130 acres without first holding a fact-finding hearing to determine whether Ewan actually had an application for those lands pending before the Department on or before the December 18, 1971, repeal of the Native Allotment Act. The State objects to BLM's acceptance of the BIA documentation as corroborating Ewan's original intent to file for the additional 130 acres because, by doing so, BLM has avoided a clear requirement that disputed facts be resolved at a hearing, thus depriving the State and other interested parties of a forum in which to explore Ewan's assertions.

In its answer, BLM contends that the State misapprehends the applicable rules governing reinstatement of Native allotment applications. BLM asserts that, while judicial and Board precedent require BLM to afford a Native allotment applicant a hearing before rejecting reinstatement of an allotment application where no corroborating evidence of the timely filing of an application for additional lands has been submitted, BLM may properly reinstate an application for additional lands without a hearing if BLM is satisfied with the offers of proof presented by the applicant demonstrating an original intent to apply for lands which BIA erroneously omitted from the application submitted to BLM. In this case, BLM notes that Ewan's declaration on his application that the 29.02 acres described therein denoted only part of his land and that the remaining 130 acres had been taken from him indicates that a significant error may have been made. Moreover, the 1960 BIA documentation provides confirmation of his original intent to apply for the additional acreage, and the State has offered no conflicting

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2/ While the State's appeal necessarily implicates all of the decision below, it is important to note that the State would only have standing to appeal from so much of the decision as affected lands patented to it. See generally Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994).

evidence undermining the persuasiveness of these proofs of Ewan's original intent. BLM insists that BIA's failure to include lands properly and timely requested cannot prejudice BLM's consideration of the application for those lands. BLM stresses that its decision notifying interested parties of the reinstatement of Ewan's claim did not determine the adequacy of Ewan's use and occupancy of the land nor did it approve the allotment application. Thus, BLM submits, the State and any other interested party will still have ample opportunity to submit additional information for the record and to challenge approval of the reinstated allotment by bringing a private contest or protest proceeding.

Notwithstanding the foregoing arguments, however, on November 20, 1995, the parties to this appeal filed a joint motion seeking to have the appeal dismissed as premature under the rule enunciated in Bay View, Inc., 126 IBLA 281 (1993). For the reasons set forth below, we agree that dismissal is appropriate.

[1] In Bay View, Inc., supra, the Board faced a situation in which BLM had accepted an amended Native allotment application relocating an allotment onto lands that had previously been transferred out of Federal ownership. While the Board noted the Department loses subject-matter jurisdiction over lands that have already been conveyed out of Federal ownership, it further noted that, under Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), consideration of the application for the purpose of making a preliminary determination whether the applicant had a claim to land at the time of the conveyance was appropriate. We cautioned, however, that:

> Any such preliminary inquiry would not constitute an adjudication of title to the land, as the land has been conveyed and, hence, BLM has no jurisdiction to adjudicate a claim of title. Thus, in one such case involving land previously conveyed, the Department rejected a request for a hearing and held:
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> > After patent has issued, the purpose of inquiry and investigation is for information of the Department, whether proper ground exists to seek cancellation of the patent by suit. Such proceeding is not an adversary one, but is an administrative proceeding for information of the Department and may be conducted in such manner as suits its own convenience, and as is, in its own judgment, best calculated to attain its object. It determines no right of parties adversely claiming land no longer public, or property of the United States.
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> Heirs of C. H. Creciat, 40 L.D. 623, 624-25 (1912); quoted in State of Alaska, 45 IBLA 318, 326 (1980). Accordingly, there

> is no final BLM decision in this matter since BLM is not adjudicating title to the land at this stage. Hence, this matter is not yet ripe for review by the Board. If BLM persuades the Federal district court to order a reconveyance of the new land embraced in the amended Native allotment description, then an adjudication by BLM of the applicant's entitlement to an allotment of the new lands would necessarily be appealable to the Board. See 43 CFR 4.410. It follows that the appeal of BLM's preliminary determination to accept the revised allotment description is properly dismissed as premature. [Footnotes omitted.]

Id. at 287-88. See also State of Alaska, 127 IBLA 276, 277 (1993).

We agree with the parties that the above rationale is clearly dispositive of the instant appeal and that dismissal of the State's appeal as premature is appropriate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the State's appeal is dismissed and the case files are remanded for further action as deemed appropriate consistent with the foregoing.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge